

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 Richmond Division

4
5 ePlus, Inc.,

6 Plaintiff,

7 versus

309 CV 620

8 Lawson Software, Inc.

9 Defendant

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12
13 before: HONORABLE ROBERT E. PAYNE
14 Senior United States District Judge

15
16 August 10, 2010
17 Richmond, Virginia

18
19 Phone Conference

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21
22 Gilbert F. Halasz, RMR
23 Official Court Reporter
24 U. S. Courthouse
25 Richmond, Virginia
 (804) 916-2248

1 THE COURT: Hello.

2 MR. MERRITT: Hello, Judge Payne. Can you
3 hear us?

4 THE COURT: Yes, I can. It always helps
5 when you push the right button.

6 All right. This is ePlus against Lawson,
7 3:09 CV 620.

8 And there has been some papers filed at
9 the request of ePlus following an argument on
10 ePlus' motion in limine. Excuse me. Lawson's
11 motion in limine number 3 to preclude
12 Dr. Russell Mangum from testifying at trial.

13 And you submitted a decision to read i4i
14 Limited Partnership. There have been some
15 briefs filed.

16 First, there is a question of whether -- I
17 don't understand what the positions of the
18 parties are -- whether the parties actually
19 agreed that the deposition of experts would
20 serve as rebuttal expert reports. It looks to
21 me like that the two of you are at odds on that
22 position.

23 What is the position of the plaintiff and
24 the support that you have for it? And the
25 position of the defendant?

1 Please, starting, with the plaintiff.

2 But first, who is here for plaintiff and
3 who for the defendant?

4 Starting with the plaintiff.

5 MR. MERRITT: Your Honor, this is Craig
6 Merritt and Henry Willett from Christian and
7 Barton on behalf of the plaintiff.

8 Mr. Robertson and Mr. Strapp are on the
9 line as well.

10 MR. CARR: Judge, this is Dabney Carr with
11 Troutman Sanders on behalf of Lawson Software.
12 And Dan McDonald and Rachel Hughey from
13 Richmond Coal are also on the line.

14 THE COURT: Start with the first issue,
15 ePlus.

16 MR. MERRITT: Your Honor, this is Craig
17 Merritt.

18 Others can correct me if I have any of
19 this wrong, but I am advised that the parties,
20 I think primarily Mr. Robertson and
21 Mr. McDonald, had a discussion arising out of
22 the fact that the parties had agreed some time
23 ago that there would not be rebuttal written
24 expert reports. As a consequence the idea was
25 that when these experts gave their depositions

1 the parties would be able to explore further
2 that which had been disclosed in their reports
3 and to allow the experts an opportunity to
4 respond to each other's criticisms and that
5 whatever was in those transcripts would be
6 considered part of the expert disclosures --

7 MR. CARR: Judge --

8 MR. MERRITT: -- and usable at trial.

9 THE COURT: What is the position of
10 Lawson?

11 MR. McDONALD: Your Honor, this is Dan
12 McDonald.

13 My recollection of that -- and there was
14 nothing that ePlus supplied that is
15 inconsistent with my recollection -- is that to
16 streamline the case we stopped the third round
17 of experts. We had two rounds. We had the
18 original report and rebuttal expert, written
19 reports in this case. We didn't have a third
20 round of surrebuttal reports. And the
21 agreement was any surrebuttal would be covered
22 by the depositions as well as any inquires
23 people wanted to go into regarding the original
24 reports that the experts provided. Certainly
25 there is nothing even about what I heard

1 counsel for ePlus say that would indicate that
2 the parties agreed that the original reports
3 could be deficient and you could fix that by
4 depositions that occurred later in the case.
5 That was not the agreement at all. It was we
6 could ask about what the opening expert thought
7 about the opposing party's rebuttal expert
8 report when the opening expert was deposed. So
9 there is no agreement here that would allow
10 curing defects in the original report. And I
11 would also note that ePlus did not raise that
12 in their opposition to this motion in the first
13 place.

14 MR. ROBERTSON: Your Honor, this
15 Mr. Robertson. Mr. McDonald and I had this
16 conversation. I don't think we had this
17 agreement.

18 THE COURT: What? Say again. I lost you.
19 I don't see --

20 MR. ROBERTSON: This is Mr. Robertson.
21 And Mr. McDonald and I had this agreement with
22 respect to, you know, the expert reports and
23 how the depositions would serve as part of the
24 rule 26 disclosures. Let me just say with
25 respect to damages which were focused on here

1 today, there was Mr. Mangum's initial report,
2 and then there is a response report a month
3 later from Mr. Green. Excuse me. I should say
4 Dr. Mangum, Dr. Green. And no opportunity for
5 Dr. Mangum to respond to Dr. Green's criticisms
6 other than in his deposition. So clearly the
7 deposition by agreement was intended to provide
8 an opportunity to respond to any criticisms. I
9 think that is what I heard Mr. Merritt and
10 Mr. McDonald just agree on. So I think I am
11 trying to get down to the basic nub of the
12 question.

13 Problems with the initial report. We are
14 trying to respond to criticisms and have an
15 opportunity to have rebuttal because the
16 schedule became so truncated.

17 THE COURT: No, wait a minute. Wait a
18 minute. You are singing two different tunes
19 here. There is a difference between whether
20 you are going to respond to something in
21 Mangum's, in his deposition, is going to
22 respond to some criticism of his report and
23 whether he was going to issue another report.
24 Those are two different things.

25 MR. ROBERTSON: Well, we had an agreement,

1 Your Honor, that there would not be a rebuttal
2 report, but that the deposition could serve as
3 the equivalent of a rebuttal report. That was
4 the essence of our agreement. I am not hearing
5 anything that Lawson is saying that contradicts
6 that.

7 THE COURT: Wait a minute. Wait a minute.

8 MR. ROBERTSON: The schedule that we had
9 and what we were trying --

10 THE COURT: Quit talking. Stop talking.

11 Mr. McDonald, did you agree or not agree
12 that the deposition would serve as a rebuttal
13 report, that is, Mangum would have the opening,
14 response would be by Green, and the deposition
15 of Mangum would be a rebuttal report? Did you
16 or did you not have that agreement?

17 MR. McDONALD: We agreed, yes, Your Honor,
18 that the deposition would be -- I would call
19 really the surrebuttal, to be clear, because I
20 would view Green, our damages expert, as the
21 rebuttal witness. And then Mr. Mangum would
22 have the chance to surrebut his report. That's
23 what the agreement was.

24 THE COURT: I think the term is opening
25 report, response report, and the reply,

1 rebuttal report. But that is the term I am
2 going to use.

3 MR. McDONALD: Okay.

4 THE COURT: Now that is taken care of.

5 Now, what I perceived in the briefing was
6 that Lawson attacked Mangum's report in its
7 opening brief as lacking improper methodology
8 by use of litigation settlements and basing his
9 conclusions on speculation and guess work under
10 the basic arguments where the litigation
11 settlements were of minimum probative value.
12 They were, in substance, because of their
13 context in which they were arrived at, they
14 were of limited probative value because they
15 were years after the hypothetical negotiation
16 would have occurred. That they, the reports,
17 ignores Mangum's report, ignores ePlus' own
18 valuation in 2002 of \$12,000. That lump sum
19 settlements under the Lucent decision are not
20 generally probative of a reasonable royalty on
21 a running basis. That the royalty base did not
22 rely on actual sales but projected sales. Not
23 based on any real data, but based on expert
24 reports for ePlus in the SAP case. That there
25 was over inclusion in the royalty base by

1 including royalties on non accused products.
2 That there was no explanation of how he took
3 the reasonable royalty rate from a range of 2.5
4 to 3.7 percent to a different range of 5 to
5 6 percent.

6 That is basically what I understood the
7 attack on his original report to be.

8 Now, that said, Mr. Robertson, you wanted
9 to file a paper bringing -- or you wanted me to
10 pay attention to the decision in the I4Ii4i
11 Limited Partnership case. Essentially I told
12 you all at the hearing that I thought that
13 Mangum's report failed Daubert and Kumho
14 because I thought it was speculative and that
15 on the key points, he did not explain how he
16 got from 2.5, range of 2.5 to 3.7 to a
17 different range of 5 to 6, which in essence
18 increases the royalty, doubles the royalty
19 claimed.

20 So you wanted me to read i4i. I have read
21 i4i versus Microsoft. And you wanted to argue
22 it. So argue it.

23 MR. MERRITT: Your Honor, this is Craig
24 Merritt. I am going to address the case, if I
25 might. We thought that the case -- and I

1 believe it is a little hard to read, the I4I
2 case -- and we think it is of some use to The
3 Court and very helpful in three ways, really.

4 First of all is as a general proposition
5 it is reasoning, is working to draw the line
6 between the question of admissibility under
7 rule 702 and the weight that is to be accorded
8 to an expert's testimony. And the basic stance
9 of the case is that certainly there is a
10 clearly-acknowledged gatekeeper role under rule
11 702, but it is a cautionary case in that it
12 reminds us, I believe, that cross-examination
13 and the common sense of jurors retain an
14 important role and that they are trustworthy.
15 We think that basic stance is one that
16 shouldn't be lost when presented with a brief
17 like Mr. McDonald's, which is certainly an
18 excellent outline of a cross examination of
19 Dr. Mangum, but perhaps not grounds for not
20 admitting his testimony.

21 The other two points in the case are
22 narrower, and we also think very helpful.

23 You will recall, Judge Payne, that rule
24 702 was amended in 2000 after both Daubert and
25 Kumho, and the effort was made to give the

1 courts three factors to look at in determining
2 whether these materials should be admissible.
3 I think two of these are very much in play on
4 this motion, and they are more grasped by I4I.
5 First of all it talks at pages 853 and 854
6 about the application of the expert in the case
7 of the Georgia Pacific factors.

8 It reaffirms the obvious and well
9 recognized point that Georgia Pacific is the
10 means of analysis to be used in determining a
11 reasonable royalty in these cases. But it
12 also, without saying so explicitly, it clearly
13 inputs it in the case that the Georgia Pacific
14 factors are not an exercise in mathematical
15 precision. They are really a quantitative rather
16 than qualitative analysis. And what the expert
17 is doing in I4I is the same thing that
18 Dr. Mangum is doing here. He is trying to
19 identify those factors that tend to bias the
20 royalty rate up or down or are neutral. We are
21 not aware of, and maybe someone is, but I don't
22 believe we are aware of any published
23 authority.

24 THE COURT: We had an equipment
25 malfunction.

1 Okay. Go ahead.

2 MR. MERRITT: We are not aware of any
3 authority, for example, that would grab Georgia
4 Pacific factor five and say, here is the
5 mathematical formula by which you apply number
6 five to determine how to adjust a base rate up
7 or down.

8 All of these are looked at by economists
9 who apply reasonable economic assessment to
10 these. It is a qualitative and not
11 quantitative analysis. And I4I is a case in
12 which there was obviously a very substantial
13 verdict of \$200 million and upholds that
14 approach. So in terms of the reliability of
15 the approach that the ePlus expert on damages
16 is taking in this case we think I4I should give
17 The Court some comfort that his approach is an
18 analytical approach, is acceptable, and based
19 on reliable principles and methods.

20 The other point that we think is of some
21 value to The Court as it considers this is that
22 in looking back at the brief on Lawson's motion
23 in limine number 3 --

24 THE COURT: Which brief?

25 MR. MERRITT: The initial memorandum that

1 was submitted in support of the motion in
2 limine number 3.

3 THE COURT: What page?

4 MR. MERRITT: I am looking at page ten.

5 THE COURT: All right.

6 MR. MERRITT: Under part D at the top of
7 the page. It is only a paragraph. The heading
8 says, "Dr. Mangum's proposed royalty rate is
9 unsupported by the facts." Now, the argument
10 under that is by and large a regurgitation of
11 points that are already made, not only in the
12 brief but in motions limine number one and two.

13 But to the extent Lawson is suggesting
14 that the argument on admissibility should be
15 framed around whether certain facts support or
16 fail to support an expert's opinion, we think
17 that i4i deals with that rather decisively.

18 If you look at the discussion that begins
19 at the bottom of page 855 and continues on to
20 page 856, the federal circuit -- and I will not
21 read it at great length, but I will read a
22 couple of passages -- it says this: "Microsoft
23 is correct that an i4i expert could use other
24 data in his calculations. The existence of
25 other facts, however, does not mean that the

1 facts used fail to meet the minimum standards
2 of relevance or reliability."

3 And then it goes on at the bottom of the
4 page. I am looking at page 586. "While data
5 was certainly imperfect and more or different
6 data might have resulted in a better or more
7 accurate estimate in the absolute sense, it is
8 not the district court's role under Daubert to
9 evaluate the correctness of facts underlying an
10 expert's testimony."

11 Then it cites the Microcam case and
12 continues.

13 "Questions about what facts are most
14 relevant or reliable to calculating a
15 reasonable royalty are for the jury. The jury
16 was entitled to hear the expert testimony and
17 decide for itself what to accept or reject."

18 So, we believe that within the bounds that
19 are set out in i4i and discussed in some
20 detail, given the fact factually the case is
21 fairly close on point with this one, we believe
22 that it strikes a cautionary note that
23 confusing questions of weight with those of
24 admissibility is one that we should try to
25 avoid.

1 And we wanted Your Honor to have that case
2 simply because it is a recent federal circuit
3 case. It was not highlighted in the briefing
4 or in the colloquy before The Court. And we
5 thought that whatever your decision is on this
6 it would be useful and would certainly be of
7 some controlling effect simply because it is a
8 federal circuit decision.

9 THE COURT: Well now, that raises the
10 question you just are asserting that the
11 federal circuit interpretation of rule 702
12 applies here and not the law of the regional
13 circuit. I don't understand that to be the
14 case. Have you got any case that says that?

15 MR. MERRITT: No, sir. It is not the
16 case. In fact, i4i was applying the rules of
17 the fifth circuit, which is an abuse of
18 discretion rule. The fourth circuit has
19 exactly the same standard. And we don't see
20 any distinction in the way the fourth and fifth
21 circuits would apply the test under rule 702.

22 THE COURT: Fourth circuit applies the
23 test of Daubert and Kumho with great
24 stringency, I believe. But I understand your
25 point. So we are in agreement that the law of

1 the regional circuit applies, not the federal
2 circuit.

3 MR. MERRITT: That is correct. I think
4 that is a long-standing rule acknowledged by
5 the federal circuit. Whatever standards are in
6 the fourth would apply in this matter,
7 including the abuse of discretion standard of
8 review.

9 THE COURT: Yes, I am talking about
10 interpretation of the law and the application
11 of it as well.

12 All right. Anything else?

13 MR. MERRITT: No, sir.

14 THE COURT: Mr. McDonald?
15 Who is going to argue?

16 MR. McDONALD: Did you ask for --

17 THE COURT: Who is going to argue for the
18 defendant, for Lawson?

19 MR. McDONALD: This is Dan McDonald, Your
20 Honor.

21 THE COURT: Yes.

22 MR. McDONALD: What I heard from ePlus,
23 there was a rather generic recitation of what
24 the law is regarding admissibility of experts.
25 And citing really some of the most generic

1 parts of that i4i case.

2 I would like to talk briefly about what
3 the actual facts were of that case, and how
4 they actually got to the damages, because it is
5 very different from what we have here.

6 They assert that is the bench mark. But
7 the bench mark had nothing do with the
8 settlement agreements in other cases, or
9 efforts to convert lump sums into royalty
10 rates. Instead the bench mark was looking at
11 the accused infringer's profit margin on the
12 products using the technology and applying
13 apportionment of profits to come up with a
14 starting point of exactly \$96 per unit.

15 The expert then looked at Georgia Pacific
16 factors and decided some of the factors made it
17 appropriate to use that higher, but the amount
18 higher that the expert adjusted was \$2 on top
19 of that 96, only about two percent of his bench
20 mark rate.

21 The flaw that we pointed out at page ten,
22 among other flaws, of our brief was that the
23 Georgia Pacific factors aren't an opportunity
24 for an expert to pay lip service to a
25 methodology while simply substituting their own

1 judgment to come up with a number that had no
2 analytical basis or connection to the facts of
3 the case.

4 Here the range was going from 2.5 to 3.7
5 at least. Specifically we are talking about
6 right now, because, Your Honor, we did list the
7 other flaws in the report that we believe
8 exist. I am just going to focus right now on
9 that leap from the 2.5 to 3.7 percent range
10 going all the way to 5 to 6 percent. Nothing
11 about the i4i case would indicate that that is
12 a justified, analytically acceptable under
13 Daubert thing for a damages expert to do, to
14 make such a huge jump from his own range.

15 And the testimony, the deposition
16 testimony of Mr. Mangum, we don't believe it is
17 a way to fill in any missing parts of the base
18 report. EPlus has not cited any new
19 information that came along after the original
20 report that would justify supplementation. But
21 when you actually read the deposition it really
22 doesn't help him on these issues any way.

23 Page 312, for example, of the deposition
24 he admits that he is increasing the rate based
25 on his judgment.

1 THE COURT: Wait a minute. Wait a minute.

2 MR. McDONALD: Five to six percent because
3 he is not sure what effect the Georgia Pacific
4 factors would even have on the bench mark.
5 Even he doesn't know, he admits, really, what
6 the right number should be based on his own
7 analytical approach.

8 THE COURT: What page are you talking
9 about? What page of the deposition are you
10 talking about?

11 MR. McDONALD: 312.

12 THE COURT: Let me find it. I have the
13 page. Give me the text. What line?

14 MR. McDONALD: Beginning of line 7. This
15 is, obviously, starting in the middle of a very
16 long answer to a question. But I am going to
17 zero in at line 7. "I have identified a range,
18 talking about the 5 to 6 percent range, because
19 I am not exactly sure what in a precise way the
20 effect of those other factors are. So it may
21 be that results in a royalty rate of 3.5. It
22 might be that it is much as 6. I wasn't sure."

23 That is what I am talking about.

24 THE COURT: All right.

25 MR. McDONALD: And i4i has nothing to do

1 with either the bench mark start point we have
2 in this case or the huge deviation from the
3 expert's own professed range of bench mark to
4 the ultimate opinion.

5 THE COURT: All right.

6 Any response?

7 MR. MERRITT: Your Honor, just a couple of
8 things. First of all, it is helpful to
9 remember that Mangum's deposition was taken
10 after all of the expert reports were filed.
11 And, in fact, after motion in limine number 3
12 was filed.

13 So counsel for Lawson were fully armed
14 with all of the arguments that they have made
15 to The Court and had the opportunity to explore
16 those in whatever depth they thought was
17 appropriate at Mr. Mangum's deposition, which
18 is not the usual case.

19 Given that fact, if counsel believes that
20 a weakness has been identified in any
21 particular part of the expert report, that is
22 fodder for cross examination, not a ground for
23 complete exclusion of the witness.

24 The second thing, there is a piece of this
25 that sort of slips that keeps being repeated.

1 When Dr. Mangum did his original analysis of
2 the SAP and Rebo settlements, which were pure
3 present value mathematics that we all learned
4 in the seventh grade. Nothing subjective about
5 it. He identified a range of 2 to 8 percent,
6 roughly, into which those licenses could have
7 fallen based on different assumptions as to the
8 length of time they would be effective. So,
9 this idea that somehow he has doubled something
10 when in fact his 5 to 6 percent falls sort of
11 to the mid range of what the full underlying
12 mathematics of SAP and Rebo compute is
13 something that we are a little concerned about.

14 THE COURT: He eliminated that,
15 Mr. Merritt. It was actually 1.8 and 3.7 and
16 he eliminated both of them as outliers and got
17 himself down to 2 -- he is the one who chose to
18 put it in the range of 2.3 or 3.7.

19 MR. MERRITT: That is absolutely correct.

20 THE COURT: Because of mathematics being
21 inaccurate.

22 MR. MERRITT: There were a series of steps
23 that took place starting with the simple
24 mathematical calculation that economists do
25 based on reasonable assumptions, not on pure

1 mathematical precision that are precisely the
2 things that Dr. Mangum did in this case.

3 Again, Lawson argues as if there is some
4 perfect algorithm by which this is done. I
5 have not seen that case. Maybe it is out
6 there.

7 THE COURT: All right.

8 MR. MERRITT: But as long as it is within
9 a reasonable degree of economic certainty and
10 he can articulate what he did, if he has not
11 articulated it well then on cross examination
12 counsel can highlight that and break it down
13 for the jury.

14 THE COURT: Did he say that this was all
15 done to a reasonable degree of mathematical
16 certainty like you said? Did he say reasonable
17 degree of economic certainty? I didn't see
18 that in his opinion.

19 MR. MERRITT: Someone who is more familiar
20 with his report would have to answer that
21 question, Your Honor. I can't vouch it.

22 THE COURT: I know it is not in his
23 report. I don't see it in the highlighted
24 parts of his deposition that you all gave me.
25 So if he said it, I want to hear it now.

1 MR. ROBERTSON: This is Mr. Robertson.

2 I don't think those words appear in his
3 report. What he did say was he applied Georgia
4 Pacific factors as he understood them, and he
5 understood that to be the methodology. That is
6 the accepted methodology you get. He did it to
7 the best of his ability. Identified eight
8 factors that he thought warranted an increase
9 in the royalty rate. Did he do it with the
10 mathematical certainty --

11 THE COURT: Nobody requires mathematical
12 certainty. All right. Thank you.

13 The law in this case is set by Daubert and
14 Kumho. And the amendments to rule 702 did
15 occur after Daubert and Kumho were decided.
16 But they reflect an attempt by the rules
17 committee, as is clear from the record, to
18 embody the general notions of Daubert,
19 certainly not to embody the specific factors of
20 Daubert because Daubert was focused principally
21 upon the issue of scientific reliability. And
22 Kumho made subsequently clear that the basic
23 rule of Daubert and responsibility of the trial
24 court was to apply in cases all kinds of
25 expertise permitted by the rules, scientific,

1 technical, and specialized knowledge. But
2 Kumho made it also clear that the touchstone
3 used in Daubert for the scientific calculation
4 or analysis did not necessarily have to apply
5 to other kinds of analysis.

6 It is wise, I think, in assessing this
7 motion to go back to basics and see what the
8 Supreme Court said. Sometimes people forget
9 what the Supreme Court said. The Supreme Court
10 meant what it said, and it did so for a reason.
11 Here is the reason. The reason is that for
12 years before Daubert junk science had become
13 the vogue, the popular way to present things,
14 and it became the rule that an expert was
15 permitted to testify by district courts because
16 the person was an expert, and permitted to
17 testify in a way that essentially said it is so
18 because I say it is so, and I am an expert.
19 And the Supreme Court said that is the end of
20 that. That was, if you will go back and look
21 at the bottom line of the Bendectin decision in
22 the district court, court of appeals, that is
23 the fundamental frame work within which the
24 Supreme Court got this case.

25 The court made emphasis we were to focus

1 on whether scientific, technical, or other
2 specialized knowledge would assist the trier of
3 the fact to understand the evidence or to
4 determine a fact in issue. And said that it is
5 the trial judge's job to insure that any and
6 all scientific testimony or evidence admitted
7 is not only relevant, but reliable. And the
8 locus of the obligation was found in the rule
9 and was found in the part about whether the
10 knowledge will assist the trier of fact to
11 understand the evidence or determine a fact in
12 issue.

13 And the rule said the Supreme Court was to
14 assure that the testimony, whatever source it
15 came from, would be reliable and relevant. It
16 then went on to point out, citing Judge
17 Becker's opinion in the Downing case, that
18 there is another component to relevance, and
19 that is fit. Additional consideration, said
20 The Court, under rule 702 -- and another aspect
21 of relevancy is whether expert testimony
22 proffered in the case is sufficiently tied to
23 the facts of the case that it will aid the jury
24 in resolving a dispute. This consideration has
25 been aptly described by Judge Becker as one of

1 fit. Fit is not always obvious, and scientific
2 validity for one purpose is not only scientific
3 validity for other unrelated purposes.

4 The Court then went on to talk about the
5 measure of scientific testimony. Has it been
6 tested? Is the technique or theory tested?
7 Has there been peer review? Is there a known
8 rate of error? And then it allowed
9 consideration of general acceptance, which is
10 in part how the issue came to the Supreme
11 Court. Because up until then the rule of
12 general acceptance and scientific community
13 enunciated in Frye had in fact been the
14 criterion for the admissibility of evidence in
15 the federal courts.

16 The Court made perfectly clear that the
17 focus of the trial judge's gatekeeping
18 responsibility is on method and principles not
19 upon the conclusions. There is no question
20 about that. That aspect of i4i is not at all
21 unusual. It has in fact been clear, if it
22 weren't before then, since Daubert was decided.
23 That is found at 2797 and 2798 of 113 Supreme
24 Court.

25 So, too, is the concept that vigorous

1 cross examination, presentation of contrary
2 evidence, and careful instruction on the burden
3 of proof are the traditional and appropriate
4 means of attacking shaky but admissible
5 evidence. So that principle was not announced
6 in i4i, and it is not new. It is a fundamental
7 precept by which all courts are required to
8 judge the admissibility of evidence and to draw
9 the line between the admissibility of evidence
10 and the conclusions being reached.

11 Kumho then took the matter further. Kumho
12 held that the basic principles of Daubert, the
13 gatekeeping function, that is, applied to
14 scientific testimony, and indeed to all expert
15 testimony. Indeed that wasn't even a subject
16 of disagreement by the time it got to the
17 Supreme Court.

18 And there they were really basically
19 dealing with in great measure with the
20 experience-based testimony. But they once
21 again enunciated that the gatekeeping inquiry
22 must be tied to the facts of the particular
23 case, i.e., the fit. Citing Downing and citing
24 the Daubert enunciation.

25 In Kumho itself the Supreme Court said as

1 it cited itself from the Joyner decision,
2 nothing in either Daubert or the federal rules
3 of evidence requires a District Court to admit
4 opinion that is connected to existing data only
5 by the ipse dixit of the expert. Ipse dixit
6 means that it is so because I say it is so.
7 That same precept has been adopted in Pugh
8 against Louisville Ladder, Incorporated in 361
9 federal appendix, and citing a number of cases,
10 including Joyner, holding that the district
11 court discretion includes the discretion to
12 find that there is, citing Joyner, simply too
13 great an analytical gap between the data and
14 the opinion proffered in deciding whether or
15 not the proper evidence is of the ipse dixit
16 variety. In fact, the two text parts in
17 footnote four of that case, Pugh, make quite
18 clear the relationship and the nexus between
19 them.

20 In Bright against American Household
21 Products the fourth circuit pointed out that
22 Daubert aims to prevent expert speculation.
23 And to my knowledge those are the fundamental
24 rules by which rule 702 is to be applied.

25 Now, I have studied the deposition

1 testimony that was proffered, and I have
2 studied the report of Dr. Mangum. And I
3 believe that there is a great difference
4 between Mangum's report and the i4i, as
5 Mr. McDonald pointed out. There was a firm and
6 fixed and rationally-based bench mark that was
7 really unavailable in the i4i case. Here the
8 bench mark is really two litigation
9 settlements. For reasons which make -- I
10 understand that he articulated a reason, but I
11 never did -- I found it quite difficult to
12 understand. Dr. Mangum just threw out the
13 other litigation-related settlements. He just
14 picked the ones that had big numbers in them.

15 And the other three which he mentions in
16 his report he excludes from his analysis. He
17 concludes that the Verian, the Sciquest and
18 Perfect Commerce agreements, which are also
19 settlements that were arrived at, Verian was
20 500,000 plus 2.5 percent running royalty on all
21 sales covered by the patents in suit in excess
22 of 15 million in a calendar year. Sciquest was
23 a 2.4 million-dollar settlement. Perfect
24 Commerce, according to him, was a lump sum
25 payment of \$750,000. And his basis for

1 throwing those out was not an economic basis.
2 His basis for throwing them out was a
3 conclusory ipse dixit pronouncement. And it is
4 that he understood no discovery had occurred,
5 and it was that he understood that due to quick
6 settlements ePlus did not receive information
7 that would allow it to form an understanding as
8 to the amount of accused revenue for any of
9 these parties. As a result, he says, the terms
10 of the agreements do not represent a complete
11 valuation of the specific use of the patents in
12 suit, but rather based on avoidance of
13 litigation. He also -- he says the most that
14 can be said out of those is they provide
15 evidence of the willingness by ePlus to enter
16 into fixed payment and running royalty license
17 agreements. So out of five possible settlement
18 agreements that he could have chosen to include
19 in his base he threw out for non economic
20 reasons the three lowest.

21 There is nothing that I know of that
22 permits an expert to pick and chose in
23 selecting the base in this fashion.

24 Now, the other thing is the base itself of
25 those that were selected are shaky under the

1 law. It's true that there are cases that allow
2 settlement agreements and licenses and payments
3 used in settlement agreements, or that come
4 from settlement agreements, to be used in
5 assessing the reasonableness of the royalty.
6 But beginning a hundred years ago in *Rude*
7 against *Westcott* the Supreme Court cautioned
8 against the use of those and commented how
9 unreliable they basically would be. Subsequent
10 cases from all of the circuits, including the
11 federal circuits, counsels against the use of
12 these kinds of agreements.

13 But there are other cases that say they
14 can be used in certain circumstances. The
15 fundamental message being they are of minimal
16 probative value in arriving at a determination
17 of a reasonable royalty.

18 In particular, the federal circuit has
19 held that lump sum settlement agreements are
20 particularly unsuited to use as a bench mark
21 for the calculation of running royalty
22 agreements.

23 Now, I am aware of the *Rescue* case and the
24 two cases in Texas that make the comment that
25 *Rescue* changes the nature of the analysis.

1 There are a number of cases in Texas in the
2 same district that hold -- and in other
3 districts -- that hold that Rescue doesn't
4 change the fundamental analysis established by
5 the law of the previous federal circuit and
6 other cases.

7 In my judgment the conclusion that Rescue
8 changes the law is an unwarranted one. I do
9 not believe that it does. I don't think the
10 issue presented in Rescue is the same issue
11 that is presented here. And I think that it is
12 giving Rescue far too much credence to
13 interpret it as changing the basic results by
14 which we determine whether license agreements
15 under, excuse me, arrived at under settlement
16 agreements are a good way to calculate running
17 royalties. Nonetheless, I think we do have to
18 recognize that the general body of law,
19 confused though it may be, tends to allow the
20 use of lump sum payments out of settlement
21 agreements in certain circumstances. Or,
22 excuse me, the use of royalty provisions out of
23 settlement agreements in calculating reasonable
24 royalties. But I am -- but when you add the
25 fact that these are lump sum royalty, I mean

1 lump sum payments for the most part that in
2 fact have been converted by this man, Mangum,
3 into running royalty rates, and you consider
4 that the base he used is in every instance an
5 assumed base for the quantum of sales in
6 positing his analysis, and then you consider at
7 the same time that for no valid economic reason
8 that can be ascertained from the face of his
9 report that he has thrown out three out of five
10 settlement agreements; and when you consider
11 that ePlus itself valued these rights at a far
12 lesser figure than one has to but conclude that
13 the bench mark constructed by this expert bears
14 virtually no resemblance to the bench mark
15 constructed by the expert used by the expert in
16 i4i. So I agree that while litigation
17 settlements have minimum probative value, they
18 can be considered. But in the facts of this
19 case, the way he went about it, it establishes
20 a very shaky bench mark against which to start
21 his calculations, and the predicate settlements
22 also suffer from that, from the defect that are
23 not generally probative under Lucent, that is,
24 lump sum settlements are not generally
25 probative under Lucent of a reasonable royalty.

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Further, I have been back and studied how it is that this expert took a range of 2.5 to 3.7 and got it to 5.6. That is a basic doubling -- excuse me -- to a range of 5 to 6. That is essentially a doubling of the royalty rate. He does it by saying that certain of the factors of Georgia Pacific effectuate an increase, certain factors are neutral, without explaining what part of which one of those factors accounts for a doubling or a significant increase, nor does he explain how he factors in the aggregate to actually achieve an increase. He just makes a bunch of general statements about each of the factors, concludes that it is either statistically neutral or indicating a higher royalty rate. He doesn't say it requires arrival at a higher royalty rate in every case. He says it indicates or suggests, thereby indicating to me a considerable speculation.

What that all boils down to when you look at his factors, I think it is 5 and 6, and then 8313 is this. That is the quintessential definition of an ipse dixit. 2.5 to 3.7 goes

1 to a range of 5 to 6 because I say so. And I
2 am an expert. And that is exactly what he has
3 done. And that is a methodology flaw, not a
4 disagreement with his facts. That is just a
5 methodology flaw that renders his analysis such
6 as to be sufficiently unreliable that it will
7 not be healthy -- help the finder of the fact
8 determine an issue or understand the evidence
9 or to determine a fact in issue. And, in fact,
10 it posits a very real risk of the very threat
11 that is presented by having or allowing experts
12 to posit ipse dixit statements.

13 You get a person with a big credential who
14 comes in well dressed, is impressive, says it
15 is so because I say so, and the jury is
16 confused and apt to be -- and apt to be
17 impressed by the credential rather than the
18 analytical method. And rule 403, which Daubert
19 says has to be applied in applying it, or has
20 to be considered in applying rule 702, says
21 that that kind of evidence is to be kept out.

22 So I view this as certainly not -- I don't
23 think it is The Court's job to make the
24 judgment about whether, about the factual
25 underpinnings or the validity val non of the

1 conclusions. I know it is not. We have been
2 taught to do this, to take that approach since,
3 at least since Daubert, if not before. But
4 certainly since Daubert. That is the approach
5 of taking in this circuit, and drummed in to
6 the heads of all district judges in every case
7 that is decided on this issue. And it is the
8 methodology that is flawed. I don't address
9 the conclusions. For those reasons the motion
10 number 3 will be granted, and the motion number
11 1 and 2, therefore, are denied as moot.

12 I believe that solves, or that deals and
13 takes care of those motions; is that right? Is
14 there anything left? Is there anything left?

15 MR. McDONALD: Well, settlement agreements
16 themselves, Your Honor, are subject of a motion
17 in limine number one. Not sure by saying it is
18 moot are you saying the expert is the only way
19 that would come in? They are not coming in any
20 way? If that is right, we are fine. But if
21 that is leaving the door open to those being
22 somehow presented to the jury and those million
23 dollar numbers getting in front of the jury we
24 still would want that motion decided and
25 granted as well.

1 THE COURT: I think they ought to be able
2 to wear tee shirts that have "37 million" on
3 them, and walk in the door and say that we got
4 that in another case, so why don't you give it
5 to us here? Don't you think that would be a
6 good result? Come on, Mr. McDonald, of course
7 there is some way that perhaps this could come
8 in, this information could come in, other than
9 through Mr. Mangum that I don't understand.
10 Mr. McDonald? That I don't know.

11 MR. McDONALD: Sorry. I think that is a
12 question for Mr. Robertson.

13 THE COURT: Well, you were the one who
14 anticipated it. So I was thinking maybe there
15 was something that is in the history of the
16 case that had intimated it and beyond my kin.

17 MR. McDONALD: My recollection is their
18 opposition to motion number one was based on a
19 use by Mr. Mangum in the damages reports. But
20 I am not going to say a hundred percent sure.
21 I think that was certainly the focus. I am
22 confident of that.

23 THE COURT: All right.

24 Mr. Robertson, is there any basis for
25 those settlement agreements to come in other

1 than through the Mangum analysis?

2 MR. ROBERTSON: Yes, Your Honor, there is.

3 Let me be specific. I don't think settlement
4 agreements per se need to come in. But there
5 are two contentions made by Lawson in this
6 case. One is that the patents are, the claims
7 at issue are obvious; and the secondary factors
8 for non obviousness include commercial success
9 and licensing.

10 And we should be able to introduce under
11 those factors -- and we always have in these
12 cases been able to introduce the fact that we
13 have licensed others, and that we had
14 commercial success, particularly if someone is
15 going to come out and parade the \$12,000 number
16 that says that the context is known about, that
17 that is the value of patents, when the patent
18 actually now achieved close to \$60 million in
19 royalties.

20 Secondly, Your Honor, Lawson has a latches
21 defense that says we didn't sue soon enough and
22 therefore we should recover nothing. One of
23 the recognized ways to rebut a latches defense
24 is to show that you are out enforcing your
25 patents against others. You don't have to sue

1 everybody all the time right away.

2 You know, we are a company of limited
3 resources. So part of the evidence could be
4 that if Lawson is going to persist in this
5 latches defense, if that is it, that we were
6 out enforcing our patents against --

7 THE COURT: Mr. McDonald, wait a minute.
8 Are you asserting that they are in latches or
9 that that there is a latches defense?

10 MR. McDONALD: There is a latches defense.

11 THE COURT: You understand the difference?

12 MR. McDONALD: I am not sure if I
13 appreciate the question. Sorry.

14 THE COURT: In latches is an equitable
15 concept. And you are in latches because of
16 certain conduct you have engaged in. Latches
17 in a patent context is just -- is more along
18 the line of what Mr. Robertson is talking
19 about. You didn't sue soon enough.

20 Are you talking about latches in the
21 patent sense or in the equitable sense?

22 MR. McDONALD: In the patent case sense,
23 Your Honor.

24 THE COURT: All right.

25 MR. McDONALD: There is a case that deals

1 with Mr. Robertson's argument. Here it is.
2 Eickerman versus Chaff case.

3 THE COURT: Whoa. Wait a second. None of
4 that is raised in these motions in limine I am
5 dealing with. Or if it is, it was in the
6 disappearing ink that when my eyes read it I
7 didn't understand it to be the argument. So if
8 you all have issues on that you better file
9 something on all that, because I don't have any
10 basis for -- and I don't think, number one,
11 your motion number one implicates that, as best
12 I can tell, Mr. McDonald. But I will have to
13 say, I have viewed this as principally an
14 aspect of the report, with the Mangum report,
15 and I don't see -- in fact your brief links
16 them so closely together I don't see the
17 argument you are making now in that brief. So
18 I don't see that any of the motions in limine
19 currently call for a decision on this issue.

20 MR. McDONALD: Our motion in limine number
21 one was specific to the settlements and their
22 exclusion for any purpose. Many of those cases
23 we cited, including the one Your Honor cited
24 earlier, the Rude Westcott decision, talk about
25 their admissibility and their lack of probative

1 value for any purpose in the case. So our
2 motion was comprehensive.

3 THE COURT: Well, Mr. McDonald, that is
4 one of the things that maybe you better go talk
5 to Mr. Carr about. Because you are talking
6 about throughout this brief the royalty aspect
7 of it. It is true that you said for any
8 purpose, but you have modified that by talking
9 about it in terms of just the royalties.
10 Except maybe to the extent you dealt with the
11 financial situation of the company. But it is
12 something you are going to have to deal with in
13 objecting to documents. It is not the subject
14 of this motion in limine. It is not briefed in
15 that way, not presented that way, and not been
16 argued that way.

17 So I am not going into all that now. You
18 didn't cite those cases in that brief.

19 So that takes care of all of one, number
20 one, number two and number three, I believe.

21 Now, as presented in the motion in limine
22 you all have a pretrial conference coming up.
23 You are having to make objections to documents.
24 You make your objections, and we will deal with
25 them when they come up. Did we deal with

1 the -- I need to sort of do an inventory to
2 make sure where we stand. I have several other
3 cases, and some of them are patent cases. And
4 I am sometimes getting confused. I dealt with
5 the motion, Lawson one, two, three.

6 Now, okay. Lawson's four. Has this been
7 dealt with or not?

8 MR. McDONALD: Yes, Your Honor.

9 THE COURT: All right.

10 Five. Lawson five limiting ePlus to one
11 expert witness on infringement and one on
12 validity. I believe that I dealt with that at
13 the hearing, too, didn't I?

14 MR. MERRITT: Yes, you did, Your Honor.

15 THE COURT: Now, you all were -- wait a
16 minute -- you all were -- wait a minute. Wait
17 a minute. You all were to tell me, I believe,
18 what is the lady's name that argued? Stoll,
19 something or another?

20 MR. McDONALD: Ms Stoll-DeBell.

21 THE COURT: Ms Stoll-DeBell was told to
22 tell me whether you all were going to have
23 other experts on validity and infringement, one
24 each. And if so, what we were going to do
25 about handling discovery respecting them, et

1 cetera. I haven't heard word one, so I am
2 deciding you decided to ride the horses you
3 have got.

4 MR. McDONALD: No, we are planning on
5 using additional experts. We have been in
6 negotiations with ePlus on an agreed time table
7 for the service of the report and the
8 depositions to get them all done before the
9 trial. I think we are going to be successful
10 with that.

11 THE COURT: Okay.

12 MR. ROBERTSON: This is Mr. Robertson. We
13 didn't agree on a time table, Dan, let's be
14 fair. We had a discussion about it yesterday.

15 THE COURT: Wait a minute, Mr. Robertson.
16 He said, we were working with you. He didn't
17 say -- and he said, I think we will be
18 successful. You are saying you don't think you
19 will be. That is a different animal. But he
20 didn't say you reached an agreement.

21 MR. ROBERTSON: You are accurate, Your
22 Honor. Absolutely.

23 Obviously we would like to know who the
24 additional experts are as soon as possible. We
25 would like to get a disclosure from and take

1 their deposition in a meaningful way before
2 trial. The proposal has been made that they
3 would give us, identify their validity expert
4 by tomorrow. They don't know when they would
5 identify the source code expert they are
6 aspiring to get and giving us a report. We go
7 from August 25 and produce the witnesses for
8 deposition August -- the week of August 30.

9 THE COURT: Does that suit you?

10 MR. McDONALD: That would suit me if we
11 could get that time. I might have,
12 obviously -- two concerns I have. I mean, it
13 is their burden on invalidity. I would like to
14 be able to, obviously, respond to that. So
15 that actually puts me in a tighter bind.
16 Secondly, I assume the spirit and letter of The
17 Court's scheduling order on the two disciplines
18 that what was not contemplated is that they get
19 to call another expert to get up and say, I
20 agree with Dr. Shamos.

21 THE COURT: No, no. They can't do that.

22 MR. McDONALD: Secondly, I would think
23 your ruling on that, they are confined to the
24 second supplemental statement, means they still
25 can't go outside of that with respect to

1 another expert. We have had a meet and confer.

2 THE COURT: Obviously I have already ruled
3 on that. I haven't given license to go
4 re-visit everything in the world. I have
5 already ruled on it. Come on. You know, this
6 is why you don't ever get anywhere is because
7 you spend so much time arguing about how many
8 angels can stand on the head of a pin. Come
9 on.

10 MR. ROBERTSON: I am thankful; for the
11 clarification.

12 THE COURT: Number 5 has been dealt with.
13 I need a schedule from you all. I want it by
14 tomorrow. And I want the source, both of the
15 experts, one on the source code one on the
16 invalidity. I want them identified. What is
17 today, Tuesday? They have got to be both
18 identified not later than Thursday, and the
19 reports, you need to have the reports in time
20 to have a meaningful deposition and to allow
21 Mr. Robertson to deal with them, because I
22 frankly think this was all clear, but as I said
23 before, I believe that some of the problem was
24 created by The Court, so I have gone out of the
25 way to eliminate the problem.

1 Now, motion in limine number 6,
2 publications related to patent enforcement
3 efforts, litigation and settlement agreements.
4 Is this what you are talking about that is
5 responsive to the latches defense,
6 Mr. Robertson? Or have I ruled on it?

7 MR. ROBERTSON: I think this has to do
8 with the knowledge about the patents and
9 knowledge about ePlus. You ruled on this one.
10 I think you ruled on all the motions in limine.

11 Now, Your Honor, to be quite frank, I
12 think nothing remains unresolved.

13 MR. McDONALD: One exception might be part
14 of limine on damages number two that relates to
15 the issue. I think we are still trying to work
16 that out. I am not sure. I guess Rachel is
17 here.

18 MR. MERRITT: This is Craig Merritt. I
19 can address that.

20 We are working with Judge Dohnal directly
21 on that. He has given the parties some
22 deadlines to get that worked out by next week.

23 THE COURT: I am confused about what you
24 are talking about.

25 MR. MERRITT: Judge, you will recall there

1 was a question about the royalty base and
2 whether SKU is associated with the loss of
3 revenue and could be included. You told us on
4 July 28 to go and work that out and to involve
5 Judge Dohnal if necessary. We did that. He
6 has us on a schedule to get that worked out.

7 THE COURT: Here is what I don't
8 understand. Why is that pertinent in view of
9 the fact Dr. Mangum won't be testifying? I
10 understand what you just said about that, but I
11 don't understand why that is pertinent any
12 more. You don't have any reasonable royalty
13 testimony that I can tell.

14 MR. ROBERTSON: Judge, I understand your
15 ruling on Dr. Mangum. Obviously we respect and
16 honor it. But we should be able to put in to
17 the record what the royalty base is. And then
18 argue to the jury, you know, whatever the
19 factors are. The statute says we are entitled
20 to a reasonable royalty. That is the floor.
21 Oh, obviously we don't have an expert to opine
22 on that any more, but we should be able to put
23 in front of the jury what the numbers are as
24 far as the sales go of each revenue.
25 Mr. Mangum apparently won't be the spokesperson

1 for that, but, you know, I have that testimony
2 through other witnesses. And I have the data,
3 and produced in discovery. So that, you know,
4 I understand that you are not permitting
5 Dr. Mangum to opine on that, but the facts are
6 the facts. And the jury should be able to hear
7 those facts, sir.

8 THE COURT: You can put in any admissible
9 evidence, but how do you get it in? That's
10 something you have to figure out. I am not
11 asking you for an answer now. Just so I
12 understand.

13 I haven't ruled on this at all. One, two
14 three came up in the context of the way Mangum
15 dealt with them, as I remember. And the
16 attack, let me see number 2. The way I have
17 read this motion, it all relates to Mangum's
18 use of, and what he is going to testify about
19 this. And it doesn't address how any evidence
20 relating to SKU can otherwise come in as part
21 of your damages cases to the extent the case --
22 to the extent you can prove it without Mangum.

23 MR. ROBERTSON: Well, Your Honor --

24 THE COURT: I don't think --

25 MR. ROBERTSON: Sorry.

1 THE COURT: Do you think it does or not,
2 Mr. Robertson?

3 MR. ROBERTSON: Your Honor, I am still,
4 quite frankly, reacting to your ruling today,
5 taking it all in and thinking through a lot of
6 issues, and will be thinking about them in the
7 next few days as we prepare to meet with you on
8 Monday, August 16. You know, I am just
9 thinking out loud, Your Honor. So let me --

10 THE COURT: Well, here is a good idea.
11 Don't think out loud. It is a good idea.

12 MR. ROBERTSON: Okay. I think I will
13 reflect. I appreciate that, yes.

14 THE COURT: All right. Now, I am
15 considering that I dealt with these motions in
16 limine. If you think otherwise, you have to
17 get them in front of me in some other way.

18 All right. I think that is taken care of.

19 MR. ROBERTSON: Thank you, sir.

20 THE COURT: Thank you all very much.

21 MR. MERRITT: Thank you, Your Honor. Bye.

22

23 THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

24 Gilbert Frank Halasz, RMR

25 Official Court Reporter